sions. Commissions, *eo nomine*, can only be earned by a complete sale; the same as freight is the mother of wages, and the completing of the voyage, under ordinary circumstances, is required in order to demand freight.

But if the efforts of the broker in fact procure the purchaser, even where the bargain is made with the owner, and without his knowing of the fact that the action of the broker procured the purchaser, nevertheless, upon that fact being disclosed, nothing can be more reasonable or just than that the broker should receive commissions: *Durkee* v. *Vermont Central Railway*, 29 Vt. 127. But if the broker find a purchaser at the price required and the owner refuse to sell, the broker will be entitled to claim full commissions: *Kock* v. *Emmerling*, 22 How. U. S. 69; *Bailey* v. *Chapman*, 41 Mo. 536. So also where the sale fails through defect of title: *Doty* v. *Miller*, 43 Barb. 529; *Topping* v. *Healey*, 3 F. & F. 325.

I. F. R.

Circuit Court of the United States, Southern District of Georgia.

HARVEY W. LATHROP *v.* DAVID M. BROWN.

A state statute providing that in all suits founded on any debt or contract made prior to 1865 or in renewal thereof, the plaintiff should not have a verdict or judgment until he had made it clear to the tribunal trying the same, that all legal taxes chargeable by law upon the same had been duly paid for each year since the making of the debt or contract; and that the giving in of the debt for taxation and payment of the taxes should be a condition precedent to a recovery, is unconstitutional, as far at least as regards debts or contracts made before its passage.

On demurrer. The facts are stated in the opinion.

Harden & Levy, for plaintiff.

A. W. Stone, for defendant.

Bradley, J.—This is an action brought by Harvey W. Lathrop, a citizen of Maryland, against David M. Brown, upon a promissory note dated January 1st 1862, whereby one Jacob L. Riley, as principal, and Brown as surety, promised by the 1st of January, then next, to pay John J. McLeod, or bearer, $2280.50 for value received. Two thousand dollars were paid on the note December 8th 1865. The suit is brought for the balance. The defendant, amongst other things, pleads that the contract was made prior to 1st of June 1865, and that by a statute of Georgia of 13th of October 1870, it was enacted that in all suits brought in or before any court of the state founded on any debt or contract made before the 1st of June 1865, or in renewal thereof, it should

not be lawful for the plaintiff to have a verdict or judgment in his favor until he had made it clear to the tribunal trying the same, that all legal taxes chargeable by law upon the same had been duly paid for each year since the making of said debt or contract. And further: In every trial upon a suit founded upon any such contract, it is provided that said debt has been legally given in for taxes and the taxes paid shall be a condition precedent to a recovery on the same; and in every such case, if the tribunal trying is not clearly satisfied that said taxes have been duly given in and paid, it shall so find; and said suit shall be dismissed; and defendant avers that the causes of action in the declaration mentioned were chargeable with taxes, which have not been given in or paid.

The plaintiff demurs to this plea. The question is, whether said statute is constitutional, and I am clearly of opinion that it is not. It imposes upon the plaintiff conditions for a recovery which were not required to be performed when the contract was made—conditions onerous, and if he has not paid the taxes, impossible to be performed. It imposes a penalty and forfeiture for non-payment of taxes, which it is conceded did not exist when the taxes were assessed and payable. It therefore not only impairs the validity of a contract, but is an *ex post facto* law. Restrictions on the remedy which materially affect a contract tend as much to impair its validity as laws passed to abrogate it. They differ only in degree. I have no hesitation or doubt on the subject.

Judgment for plaintiff.

The foregoing decision possesses a peculiar interest at the present time, and especially as the same question as to the constitutionality of the statute of October 13th 1870, is now pending before the Supreme Court of the state of Georgia.

On the 11th March 1868, the "Georgia Constitutional Convention" ordained and adopted a constitution, the 3d subdivision of section 17, article 5, of which reads as follows: "It shall be in the power of the General Assembly to assess and collect upon all debts, judgments, or causes of action when due, founded on any contract made or implied before the 1st day of June 1865, in the hands of any one in his own right, or as trustee, agent, or attorney of another on or after the 1st day of January 1868, a tax of not exceeding 25 per cent. to be paid by the creditor on pain of the forfeiture of the debt, but chargeable by him as to one-half thereof against the debtor, and collectable with the debt. *Provided*, that this tax shall not be collected if the debt or cause of action be abandoned or settled without legal process, or, if in judgment, be settled without levy and sale." — By an Act

of Congress passed on the 25th of June 1868 to admit the states of North Carolina, South Carolina, Georgia, and other states to representation in Congress, it is declared among other things "that the 3d subdivision of the 17th section of article 5 of the Constitution of Georgia," as above quoted, "shall be null and void, and that the General Assembly of said state by solemn public act shall declare the assent of the state to the foregoing fundamental condition." Public Laws U. S. 1867–8. On the 21st July 1868, the legislature of Georgia accepted and assented to the said condition, leaving out the parts declared null and void by Congress.

On the 13th October 1870, the same legislature passed an act "to extend the lien of set-off and recoupment as against debts contracted before the 1st June 1865, and to deny to such debts the aid of the courts until the taxes thereon have been paid;" which is the statute pleaded in the above case. To this statute there are sixteen sections, but it is not necessary to refer particularly to any others than those quoted by the learned judge in his opinion. A general demurrer to this plea brought up the question of the constitutionality of the statute.

Judge BRADLEY has decided that the act is unconstitutional. "It not only," remarks the judge, "impairs the validity of a contract, but is an *ex post facto* law. Restrictions on the *remedy* which materially affect a contract tend as much to impair its validity as laws passed to abrogate it. *They differ only in degree.*" Such has been the ruling of the Supreme Court of the United States in a series of decisions from *Bronson* v. *Kinzie*, 1 How. 315, decided in 1843, to *Butz* v. *Muscatine*, decided in 1869, 8 Wall. 575. In the first case the court say: "Whatever belongs *merely to the remedy* may be altered according to the will of the state, *provided the alteration does not impair the obligation of the contract.* But if that effect is produced, it is immaterial whether it is done by acting on the *remedy* or directly on the contract itself. In either case it is prohibited by the Constitution." In *Van Hoffman* v. *City of Quincy*, 4 Wall. 535, the court say: "No attempt has been made to fix definitely the line between alterations of the *remedy*, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. * * * If these doctrines were *res integræ* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. *But they rest in this court upon a foundation of authority, too firm to be shaken.* * * * The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance." In *Butz* v. *City of Muscatine*, 8 Wall. 575, the court held "that a *remedy* which the statutes of a state give for the enforcement of contracts cannot be taken away, as respects previously existing contracts, by judicial decisions of the state courts construing the statutes wrongly. * * * It has been uniformly held by this court that such *remedies* are within the protection of the Constitution of the United States, and that any state law which substantially impairs them is as much prohibited by that instrument as legislation which otherwise impairs the obligation of the contract. This subject was fully considered in *Van Hoffman* v. *City of Quincy*, 4 Wall. 557."

The constitutionality of this statute of Oct. 1870, is now before the Supreme Court of Georgia; and from recent decisions delivered by that court, we are constrained to believe that the statute will be held to be constitutional. In

1868, this court held "that the provision of the Constitution of the United States, which denies to a state the right to pass any law impairing the obligation of contracts, does not interfere with the right of a state to pass *laws acting upon the remedy*:" *Cutts & Johnson* v. *Hardee*, 38 Ga. 350; WARNER, J., dissenting. This decision was delivered upon the question as to the constitutionality of the Relief-Law, passed in 1868. In 1869, the Constitutionality of the Homestead and Exemption Laws was before the court, and the court held that "homestead and exemption laws, though retroactive, do not fall within the prohibition of article 10, sec. 1st of the Constitution of the United States, declaring that no state shall pass any law impairing the obligation of a contract;" and "that the Constitution of the United States does not prohibit a state from divesting a vested right, except when that right is vested by virtue of, and under a contract of the parties." WARNER, J., dissenting: *Hardeman* v. *Downer*, 39 Ga. 425. If this court could decide the Relief-Law of 1868 and the Homestead and Exemption Laws of 1869 constitutional, it will have no trouble in deciding the Statute of 1870 constitutional, and for the third time publicly disregard the adjudications of the Supreme Court of the United States which "rest upon a foundation of authority, too firm to be shaken."

J. H. T.

United States Circuit Court, Northern District of Georgia.

JEFFERSON C. FRENCH *v.* LEWIS TUMLIN.

Judgments of the courts of Georgia during the war are valid judgments so far as relates to parties within their jurisdiction.

A judgment of a court of Georgia, in November 1861, for the purchase-money of slaves, was a valid judgment when entered, and may be enforced now.

The provisions of the Constitution of Georgia that "no court shall have jurisdiction to enforce any debt the consideration of which was a slave or the hire thereof," so far as it relates to contracts valid when made, is repugnant to the Constitution of the United States, and void.

THIS was an action of debt on a bond conditioned for the payment of a judgment obtained by one Chisolm (whose assignee plaintiff was) in the Inferior Court of Cass (now Bartow) county, November 25th 1861, but stipulating that "if the State Convention, to be held in December 1867, or any state legislature, shall pass any resolution, ordinance, act, or law that shall relieve defendant from his constitutional and legal liability to pay said judgment, or any part thereof, then defendant is to be relieved and discharged from complying with said obligation in the same way and manner, and to the same extent, that he is relieved and discharged from the payment of the judgment," &c.